Supreme Court, U.S.
FILED
OCT 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-406

In The
Supreme Court of the United States
October Term, 1986

KEYSTONE CONSOLIDATED INDUSTRIES, INC.,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW and its LOCAL 449,
Respondents.

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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* Petitioner's Statement Required by Rule 28.1 appears at page i of the Petition.

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Rather than minimizing the importance of the issues presented in the case or the absence of need for review by this Court, Respondent's Opposition vividly confirms several compelling reasons for immediate review of the Seventh Circuit's decision.

First, the central issue in this case is whether the Seventh Circuit is correct in effectively holding that employees and retirees whose pension rights and benefits are established by collectively bargained pension agreements, are denied as a matter of law under all circumstances the rights and protections afforded by Section 303 of the Employee Retirement Income Security Act,

29 U.S.C. §1083.[1] As Respondents correctly note, collectively bargained pension agreements arise "every day" (Un. Opp. 3). Thus, the Seventh Circuit's decision denying Section 303 rights to employees and retirees under these agreements has a sweeping impact; *i.e.*, potentially hundreds of thousands of persons will never be able to receive the special benefits that Congress envisioned all pension plan participants and beneficiaries receiving from Section 303. In effect, Section 303 has been rendered null and void with respect to any collectively bargained pension agreement that contains an annual funding provision. [2]

Second, the Seventh Circuit concluded that because the Petitioner and Respondents included an annual funding provision into their pension agreement, they necessarily waived the statutory funding schedule allowed by Section 303 – even though the contract language was

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[1] Respondents, like the Seventh Circuit, emphasize that Section 303 only provides for the waiver of the *statutory* minimum requirement under ERISA (Res. Opp. 2), and that this case involves the waiver of a *contractual* minimum requirement. The flaw in this analysis, among others, is that ERISA supersedes any privately negotiated rights. At a minimum, even though the IRS may not have had the power to waive the entire contractual obligation under the parties' labor contract, it had the power to waive the statutory minimum portion of the contractually required amount. The Seventh Circuit refused to go even this far in reconciling Section 303 with the collectively bargained pension contract. As discussed in the text, in so holding the Seventh Circuit has rendered Section 303 effectively null and void.

[2] The Union suggests – with no evidentiary support – that pension plan participants are "injured" as a result of the waiver (Res. Opp. 3 n. 5). This argument does not square with the record evidence. The amount waived by the IRS was many times less than the difference between the value of the Pension Plan's assets and the higher value of benefits guaranteed by the Pension Benefit Guaranty Corporation (R. 24, Ex. 6 at pp. 131-32). Thus, whether or not the waived contribution had been paid when initially due, the Pension Plan would

(Footnote continued on the following page)

included years before Section 303 was enacted and was never discussed after Section 303 became effective. This standard conflicts with the standard of this Court and several courts of appeals which require the waiver of statutory rights to be "clear and unmistakable." *See, e.g., Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Maykuth v. Adolph Coors Co.*, 690 F.2d 689, 694 (9th Cir. 1982) ("We will not infer waiver of important statutory and contractual rights without clearer statutory instruction."); *NLRB v. South Central Bell Telephone Co.*, 688 F.2d 345, 355 (5th Cir. 1982), *cert. denied*, 460 U.S. 1081 (1983) ("contractual waivers of such fundamental statutory rights must be 'clear and unmistakable' "); *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982) ("The language of a collective bargaining agreement will effectuate a waiver only if it is 'clear and unmistakable' in waiving the statutory right." (citations omitted)). Furthermore, the Seventh Circuit's decision conflicts with "national labor policy [which] disfavors waivers of statutory rights by unions and thus a union's intention to waive a right must be clear before a claim of waiver can succeed." *Chesapeake & Potomac Telephone Co.*, 687 F.2d at 636. The Seventh Circuit

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2 *(Continued)*

have been woefully underfunded. Because that underfunded condition would be expected to last for approximately 25-30 more years (*id.* at pp. 133-34), participants and beneficiaries of the Pension Plan would have no expectation of receiving more than the PBGC-guaranteed level of benefits in the event the Plan was terminated, regardless of whether the 1979-80 contribution had been timely paid or not. That level of benefits, however, would be guaranteed to the participants and beneficiaries regardless of the funding status of the Plan. Thus, the participants and beneficiaries were in no worse position with the waiver than they would have been if the waived contribution had been paid. In fact, they were in a better position with the waiver because the waiver improved Petitioner's prospects for continuing to fund the Pension Plan and thereby eliminate its underfunded status.

failed to apply the "clear and unmistakable" standard in ascertaining the intent of the parties when they included the "annual funding" language in the collective bargaining agreement, a substantial and dangerous departure from settled law. If the Seventh Circuit had applied the correct standard, it would have found that the language was adopted in 1968, long *before* the enactment of Section 303, and that the applicability or waiver of Section 303 was never discussed in subsequent collective bargaining. The Seventh Circuit's implied exception to the "clear and unmistakable" standard deserves review. *See AT&T Technologies, Inc. v. Communications Workers of America*, 106 S. Ct. 1415 (1986).[3]

Third, the Seventh Circuit, in rather cursory fashion, has found the entire Section 303 waiver granting procedure unconstitutional. In so doing, the court of appeals has gutted a vital element of a comprehensive regulatory scheme governing pension benefits in this country. A safeguard designed to protect thousands of beneficiaries has been eliminated with no justification in clear contravention of congressional intent. Indeed, the Seventh Circuit's decision jeopardizes the authority and operation of numerous administrative agencies.

Finally, the Seventh Circuit's decision conflicts with the Third Circuit's decision in *McMahon v. McDowell*, 794 F.2d 100 (3d Cir. 1986). In *McMahon*, the Third Circuit gave full effect to the Section 303 waiver at issue in that case. The conflict between this case and *McMahon*

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[3] Respondents cite the Department of Justice's argument that Section 303's legislative history supports the Seventh Circuit's decision. However, neither Respondents nor the Department cite any legislative history to support their position. As Petitioner already has shown (Pet. 12-13), the legislative history clearly establishes that Section 303 is intended to apply to all pension plans – specifically including those produced by collective bargaining. The Seventh Circuit's decision runs directly afoul of congressional intent.

leaves employees, unions and, most importantly, pension plan participants and beneficiaries, in a quandry as to the legal significance of a funding waiver obtained in conformity with the procedural and substantive requirements of Section 303.[4]

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[4] Respondents contend that this case involves a "routine judgment, enforcing a garden-variety arbitration award" (Res. Opp. 4). This may be true if one ignores the impact of ERISA, which the arbitrator and the courts below have done. The relationship between ERISA and collectively bargained pension agreements presents complex and vitally important issues that affect numerous employers and unions, as well as hundreds of thousands of individuals covered by collectively bargained pension agreements. This is hardly a "garden-variety" case.

The Union also cites *American Postal Workers v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986). That case has no bearing here because it had nothing to do with an arbitration award which irreconcilably conflicted with the requirements of federal law.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition for Writ of Certiorari, the Court should grant the Petition and give this case plenary consideration.

Respectfully submitted,

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